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Aaron Chong Chernlin v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05(M)-112–02 OF 2020
KAMALUDIN MD SAID, NORDIN HASSAN AND MOHD NAZLAN JJCA
21 NOVEMBER 2022

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Criminal Law — Dangerous drugs — Trafficking — Whether accused's conviction on drug trafficking charge safe — Whether trial judge did not commit any error in his finding of facts or decision that warranted appellate interference

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The appellant was convicted and sentenced to death by the High Court for trafficking in 379.7g of methamphetamine, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952. The drugs were found in a paper box on a table in the guest area of the appellant's apartment by a police party which raided the place after receiving a tip-off. At the time of the raid, the appellant was alone in the apartment. The trial court ruled at the end of the prosecution's case that the appellant had custody, control, knowledge and possession of the drugs given that he had exclusive possession of the apartment. In his defence, the appellant claimed that his friends often visited and stayed at his apartment. In fact, he said, on the day prior to the police raid, a friend named Chuah Bee Leong ('Chuah') asked the appellant if he could come to the apartment with his friends to play computer games. The appellant said he had no objections and told Chuah to get the keys to the apartment from his neighbour as he would not be returning to the apartment that night. Minutes after he returned to the apartment the following morning, the appellant said the police party knocked on his door. The appellant said Chuah had made a statutory declaration ('the SD') in which he had said that the box containing the drugs was left on the table in the guest area by one of his (Chuah's) friends named Chris. Chuah, however, did not testify at the appellant's trial and it was the appellant's father, SD3, who sought to adduce the SD in evidence while he was testifying during the trial. The trial judge refused to admit the SD in evidence as its maker, Chuah, was not called to testify. The trial judge found that various conflicting reasons were given why Chuah did not testify at the trial and that the SD was made 13 months after the appellant's arrest and it failed to explain why Chris brought the drugs to the apartment and why he left it there when he left the place. The judge noted that SD3 also did not make a police report concerning the information contained in the SD. The trial judge concluded that the SD was an afterthought by the defence and that 'Chris' was a fictitious character as no particulars concerning him were given to the police to enable them to investigate the matter. The trial judge found that the defence's narrative was not

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credible and that the various issues that were raised to discredit the prosecution's case had no merit. In his instant appeal against the conviction and sentence, the appellant raised a number of grounds including that the trial judge erred in finding that he had custody, control and knowledge of the drugs, that there was no break in the chain of evidence relating to the drug exhibits, that the SD should not be admitted in evidence and that adverse inference need not be invoked against the prosecution for not calling Chuah to testify or to offer him to the defence.

Held, unanimously dismissing the appeal and affirming the conviction and sentence:

(1) There was no appealable error in the trial judge's decision and the conviction was safe. The judge had properly considered and evaluated all the evidence that was before him in coming to a finding of facts and a decision that were not plainly wrong (see paras 5 & 77–78).

(2) The trial court did not err in not admitting the SD in evidence as its maker, Chuah, was not called to testify. The SD was made more than a year after the appellant's arrest. In the circumstances, the SD did not carry any weight. Chuah was not jointly arrested with the appellant and his arrest was not related to the drugs that were found in the appellant's apartment (see para 6).

(3) Since the evidence showed that the drugs and the paraphernalia related to it were found on the table in the guest area of the appellant's apartment and the appellant was the only person in the apartment, it was reasonable to hold that he had notice and knowledge of the box containing the drugs. At the material time, the appellant had exclusive possession of and access to the apartment and to the things inside it and had the power to deal with those things to the exclusion of all other persons (see para 51).

(4) This court could not interfere with the trial judge's finding of fact that there was no tampering or interference with the exhibits in the case. So long as there was no break in the chain of evidence regarding the handling of the seized exhibits, the issue of the identity of the drugs did not arise (see para 52).

(5) The trial judge found SP2 and SP3 were credible and truthful witnesses and that any contradictions in their evidence was not material but was due to their separate recollection of the events. They did not know the appellant and had no personal interest in the case. Hence, there was no reason for them to have given false evidence against the appellant (see paras 53–54).

(6) The contention that the non-calling of Chuah by the prosecution had prejudiced the appellant and that the trial court should have invoked adverse inference against the prosecution under s 114(g) of the Evidence

Act 1950 was misconceived and had no merit. The trial court found that Chuah was not jointly arrested with the appellant and that his arrest had nothing to do with the drugs found in the appellant's apartment. Hence, there was no requirement for the prosecution to have called Chuah or to have offered him to the defence. The prosecution had not withheld or suppressed material evidence to warrant the invocation of s 114(g) against it (see paras 74–75).

(7) The evidence showed that the appellant was the only person in the apartment when he was arrested. Whether at the time of his arrest or during the investigation and recording of his statement, the appellant did not inform police about Chuah nor did the appellant's father, SD3, make any police report concerning the information that Chuah had given him about the drugs found in the appellant's apartment (see para 76).

[Bahasa Malaysia summary

Perayu telah disabitkan dan dijatuhi hukuman mati oleh Mahkamah Tinggi kerana mengedar 379.7g methamphetamine, satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Dadah tersebut telah ditemui dalam kotak kertas di atas meja di kawasan tetamu pangsapuri perayu oleh pihak polis yang menyerbu tempat tersebut selepas menerima maklumat. Pada masa serbuan, perayu bersendirian di dalam apartmen. Mahkamah perbicaraan memutuskan pada akhir kes pendakwaan bahawa perayu mempunyai jagaan, kawalan, pengetahuan dan pemilikan dadah tersebut memandangkan beliau memiliki pemilikan eksklusif apartmen. Dalam pembelaannya, perayu mendakwa rakan-rakannya sering melawat dan menginap di apartmennya. Malah, katanya, pada hari sebelum serbuan polis, seorang rakan bernama Chuah Bee Leong ('Chuah') bertanya perayu sama ada beliau boleh datang ke pangsapuri bersama rakan-rakannya untuk bermain permainan komputer. Perayu berkata beliau tidak mempunyai bantahan dan memberitahu Chuah untuk mendapatkan kunci pangsapuri daripada jirannya kerana beliau tidak akan kembali ke pangsapuri pada malam tersebut. Beberapa minit selepas beliau kembali ke apartmen pada pagi berikutnya, perayu berkata pihak polis mengetuk pintunya. Perayu berkata Chuah telah membuat akuan berkanun ('SD') di mana beliau telah mengatakan bahawa kotak yang mengandungi dadah tersebut ditinggalkan di atas meja di kawasan tetamu oleh salah seorang rakannya (Chuah) bernama Chris. Chuah, bagaimanapun, tidak memberi keterangan pada perbicaraan perayu dan bapa perayu, SD3, yang akan mengemukakan SD sebagai keterangan semasa beliau memberi keterangan semasa perbicaraan. Hakim bicara enggan menerima SD sebagai bukti kerana pembuatnya, Chuah, tidak dipanggil untuk memberi keterangan. Hakim perbicaraan mendapati bahawa pelbagai alasan bercanggah diberikan mengapa Chuah tidak memberi keterangan pada perbicaraan dan bahawa SD dibuat 13 bulan selepas penahanan perayu dan ia gagal menjelaskan mengapa Chris membawa dadah ke apartmen dan mengapa beliau meninggalkannya di sana

A apabila beliau meninggalkan tempat tersebut. Hakim menyatakan bahawa SD3 juga tidak membuat laporan polis berhubung maklumat yang terkandung dalam SD. Hakim perbicaraan membuat kesimpulan bahawa SD adalah pemikiran semula oleh pihak pembelaan dan bahawa 'Chris' adalah watak rekaan kerana tiada butiran mengenainya diberikan kepada polis untuk
B membolehkan mereka menyiasat perkara tersebut. Hakim bicara mendapati naratif pembelaan tidak boleh dipercayai dan pelbagai isu yang dibangkitkan untuk memburukkan kes pendakwaan tidak mempunyai merit. Dalam rayuan semasanya terhadap sabitan dan hukuman, perayu membangkitkan beberapa alasan termasuk bahawa hakim perbicaraan terkhilaf apabila mendapati beliau
C mempunyai jagaan, kawalan dan pengetahuan tentang dadah, bahawa tiada putusnya rantaian keterangan berkaitan dengan ekshibit dadah, bahawa SD tidak seharusnya diterima sebagai keterangan dan bahawa anggapan bertentangan tidak perlu digunakan terhadap pihak pendakwaan kerana tidak memanggil Chuah untuk memberi keterangan atau menawarkannya kepada
D pembelaan.

Diputuskan, sebulat suara menolak rayuan dan mengesahkan sabitan dan hukuman:

E (1) Tiada kesilapan boleh dirayu dalam keputusan hakim bicara dan sabitan dikekalkan. Hakim telah mempertimbangkan dan menilai dengan sewajarnya kesemua keterangan yang ada di hadapannya dalam membuat dapatan fakta dan keputusan yang tidak jelas salah (lihat perenggan 5 & 77–78).

F (2) Mahkamah perbicaraan tidak terkhilaf dalam tidak menerima SD sebagai keterangan kerana pembuatnya, Chuah, tidak dipanggil untuk memberi keterangan. SD tersebut dibuat lebih setahun selepas perayu ditangkap. Dalam keadaan itu, SD tidak membawa sebarang berat. Chuah tidak ditahan bersama dengan perayu dan penahanannya tidak
G berkaitan dengan dadah yang ditemui di pangsapuri perayu (lihat perenggan 6).

(3) Memandangkan keterangan menunjukkan bahawa dadah dan peralatan yang berkaitan dengannya ditemui di atas meja di kawasan tetamu
H pangsapuri perayu dan perayu adalah satu-satunya orang di apartmen tersebut, ia adalah munasabah untuk menyatakan bahawa beliau mempunyai perhatian dan pengetahuan tentang kotak yang mengandungi dadah. Pada masa yang material, perayu mempunyai pemilikan dan akses eksklusif ke apartmen dan perkara di dalamnya dan
I mempunyai kuasa untuk menangani perkara tersebut dengan mengecualikan semua orang lain (lihat perenggan 51).

(4) Mahkamah ini tidak boleh campur tangan dengan dapatan hakim bicara tentang fakta bahawa tiada pengubahan atau gangguan terhadap ekshibit dalam kes tersebut. Selagi tiada putusnya rantaian keterangan berhubung

pengendalian ekshibit yang dirampas, isu identiti dadah itu tidak timbul (lihat perenggan 52).

(5) Hakim bicara mendapati SP2 dan SP3 adalah saksi yang boleh dipercayai dan jujur dan sebarang percanggahan dalam keterangan mereka tidak material tetapi disebabkan ingatan berasingan mereka tentang peristiwa tersebut. Mereka tidak mengenali perayu dan tidak mempunyai kepentingan peribadi dalam kes itu. Oleh itu, tidak ada sebab untuk mereka memberikan keterangan palsu terhadap perayu (lihat perenggan 53–54).

(6) Pendapat bahawa pendakwaan tidak memanggil Chuah telah memudaratkan perayu dan bahawa mahkamah perbicaraan sepatutnya menggunakan anggapan bertentangan terhadap pendakwaan di bawah s 114(g) Akta Keterangan 1950 adalah salah arah dan tidak mempunyai merit. Mahkamah perbicaraan mendapati Chuah tidak ditahan bersama dengan perayu dan penahanannya tiada kaitan dengan dadah yang ditemui di pangsapuri perayu. Oleh itu, tiada keperluan bagi pihak pendakwaan untuk memanggil Chuah atau menawarkannya kepada pihak pembelaan. Pihak pendakwaan tidak menahan atau menyekat keterangan material untuk menjamin penggunaan s 114(g) terhadapnya (lihat perenggan 74–75).

(7) Keterangan menunjukkan bahawa perayu adalah satu-satunya orang di apartmen tersebut semasa beliau ditangkap. Sama ada pada masa penahanannya atau semasa siasatan dan rakaman kenyataannya, perayu tidak memaklumkan kepada polis tentang Chuah mahupun bapa perayu, SD3, tidak membuat sebarang laporan polis berhubung maklumat yang Chuah berikan kepadanya tentang dadah yang ditemui dalam pangsapuri perayu (lihat perenggan 76).]

Cases referred to

(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor [1987] 2 MLJ 336, SC (refd)

Chan Pean Leon v PP [1956] 1 MLJ 237; [1956] 1 LNS 17 (refd)

Dato' Seri Anwar bin Ibrahim v PP and another appeal [2004] 3 MLJ 405; [2004] 3 CLJ 737, FC (refd)

Ediawe Eshilama Clinton v Pendakwa Raya [2015] MLJU 362; [2015] 9 CLJ 169, CA (refd)

Ghasem Hozouri Hassan v PP [2019] 6 MLJ 231; [2018] 6 CLJ 133, FC (refd)

Gunalan a/l Ramachandran & Ors v PP [2004] 4 MLJ 489; [2004] 4 CLJ 551, CA (refd)

Leow Nghee Lim v Reg [1956] 1 MLJ 28 (refd)

Magendran a/l Mohan v PP [2011] 6 MLJ 1; [2011] 1 CLJ 805, FC (refd)

Mohamad Yazri bin Minhat v PP [2003] 2 MLJ 241; [2003] 2 CLJ 65, CA (refd)

A *Muhammed bin Hassan v PP* [1998] 2 MLJ 273; [1998] 2 CLJ 170, FC (refd)
Munuswamy Sundar Raj v PP [2015] 6 MLJ 214, FC (refd)
Ogbugo Chioma Martha v PP [2019] MLJU 295; [2019] 1 LNS 491, CA (refd)
PP v Datuk Haji Harun bin Haji Idris (No 2) [1977] 1 MLJ 15 (refd)
PP v Denish a/l Madhavan [2009] 2 MLJ 194, FC (refd)
B *PP v Mohamed Ali* [1962] 1 MLJ 257 (refd)
Pendakwa Raya v Mansor bin Mohd Rashid & Anor [1996] 3 MLJ 560; [1997] 1 CLJ 233, FC (refd)
Pendakwa Raya lwn Mohd Isha bin Alias dan satu lagi [2003] 3 MLJ 305; [2003] 2 CLJ 142, CA (refd)
C *Parlan bin Dadeh v PP* [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)
Pie Bin Chin v PP [1985] 1 MLJ 234 (refd)
Rosli bin Yusof v PP [2021] 4 MLJ 479; [2021] 7 CLJ 681, FC (refd)
Teh Hock Leong v PP [2008] MLJU 284, CA (refd)
D *Teh Geok Hock v PP* [1989] 3 MLJ 162, SC (refd)

Legislation referred to

Criminal Procedure Code s 182A, 182A(1)
Dangerous Drugs Act 1952 ss 2, 37(d), (da), 39B(1)(a), (2), First Schedule
E Evidence Act 1950 ss 8, 9, 114(g)

Appeal from: *Pendakwa Raya lwn Aaron Chong Chernlin* [2020] MLJU 1295 (High Court, Shah Alam)

F *Geethan Ram Vincent (with Hisyam Teh Poh Teik and Lavanyia Raja) (Geethan Ram) for the appellant.*
Fauziah Daud (with Atiqah bt Abdul Karim@Husaini) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

G **Kamaludin Md Said JCA:**

INTRODUCTION

[1] The appellant was charged and convicted under s 39B(1)(a) of the
H Dangerous Drugs Act 1952 ('the Act') which carries the death penalty under s 39B(2) of the Act. The learned High Court judge ordered the appellant to be hanged by the neck until his death.

[2] Aggrieved by the High Court judge's decision, the appellant appealed to
I the Court of Appeal.

[3] At the outset, the appellant's counsel, Dato' Gheetan Ram informed this court that he will be submitting the issues raised in the written submissions. Whereas, the additional issues will be submitted by another

counsel, Dato' Hisyam Teh Poh Teik. The issues are in respect of the failure of the prosecution to call or offer Chuah Bee Leong to the defence had prejudiced the appellant and s 114(g) of the Evidence Act 1950 ought to have been invoked against the prosecution and Chuah Bee Leong should have been offered to the defence.

[4] Both the appellant's counsels have made an oral submissions and also relied on the written submissions for all the issues raised. The respondent have replied orally and also refer to the written submissions.

[5] Having heard Dato' Gheetan Ram's and Dato' Hisyam Teh Poh Teik's submissions on all the issues raised and after perusing the records of appeal and reading the grounds of judgment of the High Court judge, we find the decision is not plainly wrong or erroneous. The High Court judge has appreciated and considered the evidence before him and made a finding of facts based on the evidence before arriving at his decision.

[6] On the involvement of Chua Bee Leong, the High Court did not make any error in its decision that the statutory declaration (IDD36) is inadmissible as the maker did not appear in court. In the circumstances, no weight is to be given. The statutory declaration was also made more than one year after the arrest of the appellant. Chua Bee Leong was also not jointly arrested with the appellant and was not related to the dangerous drugs found in the appellant's apartment.

[7] We find that there is no appealable error in the judgment of the High Court judge to merit the appellate intervention. It is our unanimous decision that the conviction is safe and we affirmed the conviction and sentence of the High Court judge.

[8] Our reasons are as follows.

THE CHARGE

[9] The charge against the appellant at the High Court is as follows:

> Bahawa kamu pada 1 Ogos 2018, jam lebih kurang 10.45 malam bertempat di alamat C-23A-06, Empire City, Colonial Loft, Damansara dalam daerah Petaling Jaya di dalam Negeri Selangor Darul Ehsan telah mengedar dadah berbahaya iaitu methaphetamine seberat 379.7 gram dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39(2) Akta yang sama.

A BRIEF FACTS

[10] On 1 August 2018 at about 9pm, SP2 and his raiding team went to the appellant's apartment at No C-23A-06, Empire City, Colonial Loft, Damansara, Selangor Darul Ehsan after receiving information on activities involving trafficking in dangerous drugs at the said apartment. They arrived there around 10.40pm. When the door was opened, SP2 and his team entered the apartment, and SP2 conducted a search on the appellant's body and did not find any unlawful items on him. SP2 saw the appellant look stunned.

[11] Thereafter, SP2 conducted a search inside the apartment and found one paper box written with the words 'Aroma Diffuser' (P5A) on the table in the guest area. Inside P5A, SP2 found one plastic packet containing drugs suspected to be syabu. Besides the dangerous drugs found in the box (P5A), SP2 also found paraphernalia related to the drugs on the same table where the drugs were found and seized the items (P13–P20). There were also other items seized by SP2 (P21–P29). The appellant was silent throughout the search.

[12] SP2 prepared a search list of the items seized during the raid (P11). The appellant and all the items seized were brought to the IPD Petaling Jaya. SP2 handed over the appellant and seized items to the investigating officer (SP6) for further investigation. SP2 then lodged a police report ie Damansara Report No 10339/18 dated 2 August 2018 at 1.30am (P25).

[13] On 6 August 2018, the drugs seized from the appellant were sent to the Chemist Department by SP6 for analysis. The analysis was carried out by the chemist Rahman bin Mamat (SP4) and he confirmed that the drugs were methamphetamine and weighed 379.7g methamphetamine is dangerous drug listed under the First Schedule of the Act. SP4 prepared his chemist report (P28).

FINDING AT THE CLOSE OF THE PROSECUTION CASE

[14] At the end of the close prosecution's case, the High Court judge found the prosecution had successfully proved prima facie case of the charge against the appellant. The High Court judge found the appellant has custody and control of the paper box (P5A) which contained the dangerous drugs and also the paraphernalia related to the dangerous drugs. Hence, the appellant was deemed to have possession and knowledge of the said drugs inside the box (P5A) under s 37(d) of the Act.

[15] The finding of possession was based on the evidence of SP2 and SP3 who found the drugs inside the box 'Aroma Diffuser' on the table in the guest area of the appellant's apartment. The evidence of the owner of the house (SP5)

confirmed that the house was rented to the appellant from the period of 1 January 2018 until 31 December 2018. The tenancy agreement dated 18 December 2017 (P29) showed it was signed by SP5 and the appellant at the monthly rental of RM1,200. SP5 handed over two sets of the house keys to the appellant. The keys were identified as P24. The keys were never given to anyone else.

[16] The High Court judge was satisfied that the presumption of possession under s 37(d) of the Act applies and the prosecution had proved that the appellant had custody, control and knowledge of the said drugs hidden inside the paper box (P5A).

THE APPELLANT'S DEFENCE

[17] The appellant in his defence stated that he was staying with his girlfriend Kiki and working as a sales manager at Vision Tint Sdn Bhd in Sg Way. He can enter his apartment by using the lift without an access card. However, visitors to the apartment must register their names first in the Register Book at the guard counter at the main gate. He saw visitors fill up the Register Book to go to the apartment and there was CCTV at the entrance area in front of the apartment lift.

[18] The appellant rented the apartment from Paulene Chee Yuet Fang (SP5) and received two sets of keys. He can identify the tenancy agreement (P29). Kiki shifted to his apartment two weeks after he moved into the apartment.

[19] The appellant knew Sabrina Ooi Yit Lin (SD5) ie his neighbour next door. SD5 lived with his boyfriend Yap Kah Wai. The appellant knew SD5 for five years when she moved into the house in April 2018.

[20] The appellant has many friends. Beside him, the apartment keys were also kept by Kiki, SD5, his father (SD3), his mother, and Yen Min Khean, one of his friends. Some of his friends came and stayed in his apartment. He would ask SD5 to give the keys to them. Amongst his friends that stayed in his apartment were Tony Yap, Andrew Kee, Chuah Bee Leong and SD4.

[21] On 31 July 2018, at about 10am he received a telephone call from Chuah Bee Leong asking him whether he can come to the appellant's apartment to play the Play Station game and to spend time in the appellant's apartment. The appellant allowed Chuah Bee Leong's request and his friends to come over to his apartment. Kiki was not at home at that time because she had gone back to Indonesia to attend her family function. Chuah Bee Leong came with three of his friends at about 1.30pm. The appellant did not know Chuah

Bee Leong's friends. The appellant told Chuah Bee Leong to get the apartment keys from SD5 and the appellant went back to his parent's house to spend the night there.

[22] On 1 August 2018 at about 10.30am, SD4 called the appellant to collect his laptop from the appellant's apartment. The appellant said that he was not at home but Chuah Bee Leong was in his apartment. At about 3pm SD4 called the appellant to inform him that he had collected the laptop. The appellant then came home to his apartment and heard someone shout the words 'Polis, buka pintu'.

FINDING AT THE END OF THE DEFENCE CASE

[23] The appellant called five witnesses ie SD2 to SD6 as defence witnesses. The High Court judge analysed the defence witnesses' evidence as seen in his judgment. Chuah Bee Leong's name was mentioned by the defence and Chris's involvement. SD3 (the appellant's father) in his evidence stated that Chuah Bee Leong was afraid to come to court but agreed to make a statutory declaration (IDD36) to tell what happened at the apartment and Chris's involvement with the drugs. The defence argued that Chuah Bee Leong is a very important witness in this case because he can reveal information on Chris's involvement. The High Court judge found SD3's evidence contradicted SD6's evidence (the private investigator) that Chuah Bee Leong did not want to attend court because he was just being released from prison. The High Court judge made his finding that Chuah Bee Leong has given different reasons for not coming to court to be the defence witness. The High Court judge also made a finding that SD3 failed to lodge a police report to reveal the information given by Chuah Bee Leong in the statutory declaration (IDD36) and Chris's involvement with him. There was no explanation given by SD3 on why a police report was not lodged by him.

[24] At the time when SP2 and his team raided the appellant's apartment, the appellant was the only person inside the apartment and the appellant was near the box (P5A) which contained the drugs and paraphernalia related to the said drugs. The High Court judge did not accept the appellant's defence that he did not have knowledge of the said drugs. The High Court judge made his finding that the appellant has dominant possession of the said apartment and things inside the apartment. As an occupier of the said apartment, the appellant has care and management of the said apartment.

[25] The statutory declaration by Chua Bee Leong (IDD36) dated 17 September 2019 was made 13 months after the appellant was arrested. There is no reasonable explanation given by the appellant for the delay. The High Court judge made a finding that the information given by Chua Bee

Leong to SD3 and SD6 is an afterthought. The High Court judge also made his finding that the information given by Chua Bee Leong in IDD36 was only related to Chris. It did not relate to the appellant or Chua Bee Leong. The information given by Chua Bee Leong is not credible and difficult to believe. If it is true that the box (P5A) which contained the drugs was brought in by Chris, there was no explanation on why Chris brought P5A on 31 July 2018 or had left it on the table at the guest area of the apartment when he left the apartment on 1 August 2018.

[26] The defence argued that on 1 August 2018, the appellant was just returning home and when he was about to open his shoes, the door was knocked on by the police. Based on the inference from the facts, the learned judge made a finding that the appellant had knowledge of the paper box (P5A) which contained the drugs.

[27] The High Court judge has also considered the appellant's and SD3's evidence regarding the alleged forgery of the appellant's signature. The learned judge found the evidence is difficult to believe and to be accepted. The High Court judge made his finding that the police report (D35) is an afterthought. This is because the appellant was arrested on 1 August 2018, and the police report by SD3 (D35) related to the falsifying of the appellant's signature was made on 25 September 2019 about 13 months after the appellant's arrest.

[28] The defence also argued that the appellant did not run away during the raid or attempted to dispose of the drugs and paraphernalia. The argument was rejected. The defence also raised an issue that there was no fingerprint and DNA found on the box (P5A). The argument was also rejected because the appellant was the only person arrested inside the apartment. The learned judge made his finding that there is no mandatory requirement for the prosecution to obtain fingerprint or DNA to connect the appellant with the drugs inside the box (P5A) and paraphernalia related to the drugs.

[29] The High Court judge was satisfied and made his finding that the chain of evidence of the case exhibits from the time they were seized from the appellant's apartment, analysis by the chemist (SP4), and thereafter, brought to court for identification by witnesses is not broken. As a whole, the High Court judge made his finding that SP2 and SP3 are credible witnesses. The contradiction of SP2's and SP3's evidence if any are not material contradictions. SP2 and SP3 also did not have any personal interest in this case.

[30] The appellant and the defence witnesses claimed that the drugs belong to Chris. The High Court judge made his finding that Chris did not exist and is a mere suspicious character. Although, the name Chris is mentioned in court during the trial it does carry much weight or can be considered under the

Alcontara notice principle. The appellant did not provide a complete description of Chris and failed to prove that Chris exists. The appellant did not give any information to the arresting officer (SP2) and investigation officer (SP6) during the investigation relating to Chua Bee Leong, Chris, SD4, SD5, Yap Kah Wai, and Kiki.

[31] The High Court judge made a finding that the appellant's defence is a bare denial and an afterthought. The defence story failed to raise any reasonable doubt on the prosecution's case or to rebut the presumption of possession and knowledge on the balance of probability under s 37(d) of the Act. The appellant's defence as a whole failed to raise any reasonable doubt according to the learned judge. Hence, satisfied that the prosecution has proved its case beyond reasonable doubt against the appellant on the charge under s 39B(1)(a) of the DDA 1952 and sentence under s 39B(2) of the Act. The appellant was found guilty and sentenced to death.

GROUNDS OF APPEAL

[32] The issues submitted by Dato' Gheetan Ram are confined to misdirection or error of the High Court judge related to the finding of control, custody and knowledge, access to the house and the table in the living room, break in the chain of exhibits and/or gap on the issue of identity; failing to fairly, properly and adequately appreciate the appellant's defence; failing to adequately consider the failure to investigate by the investigating officer (PW6); the admissibility of IDD36; failing to consider material contradictions in the prosecution's case and wrongly attached a higher burden of proof.

[33] The additional issues submitted by Dato' Hisyam Teh Poh Teik are confined to the failure of the High Court judge to recognise that the failure of the prosecution to call or offer Chuah Bee Leong to the defence had prejudiced the appellant and s 114(g) of the Evidence Act ought to have been invoked against the prosecution and also that Chuah Bee Leong should have been offered to the defence.

SUBMISSIONS

[34] The submissions by Dato' Gheetan Ram as a whole in our view pertain to the arguments on the High Court judge's error in his finding of possession and knowledge of the said dangerous drugs against the appellant. The appellant's defence is that he had no knowledge of the dangerous drugs found in the box (P5A). Dato' Gheetan Ram contended that the learned judge erred in finding that control and custody were proven against the appellant.

[35] It was submitted that the arrest was made when the appellant just came home to the house a few minutes and therefore did not have any time to look at or realise the drugs nor the paraphernalia on the table. There is no evidence relating to conduct, DNA, or fingerprint to establish the appellant's knowledge of P5A. Further, the appellant did not have exclusive access to the house and living room and the said drugs in P5A on reasons of sets of keys to the house, whereby the keys, the appellant's friends had access to the said house and items belonging to others were found in the house. Based on these facts, control and custody were never proven and therefore it was not possible to invoke the presumption of knowledge.

[36] It was argued that there was a break in the chain of exhibits and/or a gap on the issue of the identity of the drugs in P5A because the search was conducted at the car park and not in the house. The raid and arrest of Chuah Bee Leong at the material time are not consistent that the drugs belonged to him. The issue of chain and discrepancies in the weight of the drugs were also challenged.

[37] It was argued that the High Court judge had failed to properly and adequately appreciate the appellant's defense. The appellant contended that the High Court judge should have appreciated evidence by defence witnesses that the appellant just returned home, the issue of access by Chuah Bee Leong and his friends on 31 July 2018, and that the appellant had no opportunity to check the house and the items on the table. The conduct of the appellant is consistent with the conduct of a person having no knowledge of the said drugs found, the information provided by the appellant led to the arrest of Chuah Bee Leong and the non-calling of Chuah Bee Leong is crucial, Chuah Bee Leong's statutory declaration (IDD36) is material and the evidence of the defence witnesses namely SD2 to SD6 was not fully appreciated.

[38] It was also submitted that the investigating officer did not conduct a fair, complete, and unbiased investigation. A fair and unbiased investigation would assist the trial court in making its decision. That aside, a fair and unbiased investigation would allow the appellant to prove his innocence and in some instances, an opportunity for the accused to exculpate himself. In this regard, the investigating officer had failed to investigate the guest registration book and the CCTV recordings at the entrance of the buildings, and the documents and other items in the living room

[39] As for IDD36, the statutory declaration affirmed by Chuah Bee Leong, on 17 September 2019 which was produced through SD2, it was argued that IDD36 should be admitted as admissible evidence because the Commissioner of Oath, Mr Samugam Vassoo witnessed the affirmation of the statutory declaration. It was submitted that the admissibility of IDD36 and the weight

attached to IDD36 are two distinct issues and the learned judge erred when he held that IDD36 was not allowed to be marked as a defence exhibit. Therefore, the learned judge reasoning is flawed as the reasoning provided affects the weight and certainly not the admissibility of the same. The fact that the High Court judge doubted the information provided by Chuah Bee Leong and found it hard to believe is not a justification for not allowing IDD36 to be marked as defence exhibit.

[40] It was argued that the learned judge had failed to evaluate the contradicting evidence given by the prosecution witnesses and the learned judge had on his own accord made inferences unsupported by evidence. The testimony of these prosecution's witnesses contradicted each other besides contradicting documentary evidence produced in court. It was submitted that the material contradictions are with regard to two issues namely, the search conducted in the car; and the arrest of Chuah Bee Leong. The appellant contended that SP2 was recalled. Initially, SP2 denied the existence and arrest of Chuah Bee Leong. After the recall, he came up with two versions. One was that he had arrested Chuah Bee Leong and the second was that he did not arrest nor has he heard of Chuah Bee Leong. Therefore, a material contradiction still exists. The prosecution has still advanced two conflicting irreconcilable versions. SP3 was never recalled. Therefore, SP3 version that there was no arrest of Chuah Bee Leong after the arrest of the appellant still remains as a prosecution version. In the light of D34 wherein SP3's name appears, once again the prosecution has led two conflicting versions. SP2 and SP3 were not truthful regarding the sequence of events. SP2 and SP3 had actually conducted a search on the car subsequent to the raid in the house. Firstly, this is a material contradiction with regards to the sequence of events. That aside this too raises a doubt with regard to the chain of evidence of the drugs after it was seized. The question is, who had care and control of the drugs after it was seized and during the subsequent search of the car.

[41] It was submitted that the learned judge had erred when he interchangeably applied different burdens. In short, it was unclear as to the actual burden the appellant was subjected to but at the very least, the appellant was subjected to a higher burden than necessary. The appellant contended that the learned judge had made contradictory findings. On the one hand, the High Court judge made findings that knowledge was proven via direct evidence and subsequently made findings that knowledge was established via the statutory presumption under s 37(d).

[42] Dato' Hisyam Teh Poh Teik submitted on the additional issues that the learned trial judge erred when His Lordship failed to recognise that the failure of the prosecution to call or offer Chuah Bee Leong to the defence had

prejudiced the appellant and s 114(g) of the Evidence Act ought to have been invoked against the prosecution.

[43] He submitted that on 31 July 2018, Chuah Bee Leong and his three friends had access to his apartment from 31 July 2018 to 1 August 2018. The appellant passed the keys to his apartment to Chuah Bee Leong. Chuah Bee Leong had in fact made a statutory declaration on 17 September 2019 (IDD36). In the said declaration, Chuah Bee Leong stated, inter alia, that he went to the appellant's house with three friends, including one Chris. The appellant was getting to leave for his parents' house. The appellant handed the apartment keys to him. Chuah Bee Leong also stated that when they left the apartment at 6.30pm he saw Chris leaving a box 'Aroma Diffuser' on the dining table of the apartment. This box was brought to the apartment by Chris. The appellant testified that after he was brought to the police station he gave information about Chuah Bee Leong. He led the police party to Chuah Bee Leong's house. Chuah Bee Leong was arrested and both he and Chuah Bee Leong were taken to the police station at IPD Petaling Jaya. The appellant asked Chuah Bee Leong about the 'Aroma Diffuser' box and Chuah Bee Leong told him that it was Chris brought in the box and was left by Chris. D34 is the police report tendered by the defence. D34 confirmed the arrest of Chuah Bee Leong by SP2.

[44] It was submitted that Chuah Bee Leong should have been offered to the defence. The duty is on the prosecution to make Chuah Bee Leong available to the defence. The defence was severely criticised by the learned trial judge when the defence was unable to produce Chuah Bee Leong. The witnesses who had been investigated by the police and from whom the statements have been recorded must be offered to the defence (see *Rosli bin Yusof v Public Prosecutor* [2021] 4 MLJ 479; [2021] 7 CLJ 681).

[45] It was submitted that the learned judge had therefore committed a most fundamental error when he reversed the burden onto the appellant to produce Chuah Bee Leong. This is a serious appealable error warranting appellate intervention. This error has occasioned prejudice against the appellant. In fact, s 114(g) of the Evidence Act could be invoked against the prosecution. Under s 114(g) of the Evidence Act 1950, the court may presume that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it (see *Ghasem Hozouri Hassan v Public Prosecutor* [2019] 6 MLJ 231; [2018] 6 CLJ 133).

[46] Based on the issues presented, the appellant's counsels submitted that the conviction against the appellant is not safe and prayed that the conviction and sentence be set aside.

A THE DECISION OF THIS COURT

[47] It is trite law that the appellate court should not interfere with the findings of the trial court when there are no compelling reasons for disagreeing with the findings. It was decided in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2004] 3 MLJ 405; [2004] 3 CLJ 737 that an appellate court does not and should not put a brake and not go any further the moment it sees that the trial judge says that that is his finding of facts. It should go further and examine the evidence and the circumstances under which that finding is made.

[48] Similarly, in *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805, the Federal Court held that the appellate court does not interfere with the concurrent findings of fact of the courts below, in the absence of very special circumstances. But where the courts below ignore, overlook or commit errors of law apparent on the face of the record which results in a serious and substantial miscarriage of justice to the appellant, it is the duty of the appellate court to step in and correct the legally erroneous decision of the courts below.

[49] As we have alluded to earlier, the issues raised by Dato' Gheetan Ram, as a whole are more concerned with the finding of facts by the High Court judge. From the submissions, the very pertinent issue to be considered is whether the High Court judge has made a correct finding that the appellant had possession and knowledge of the drugs found in the paper box (P5A) on the table at the guess area of the appellant's apartment which are the subject matter of the charge. The appellant had denied that he had knowledge of the drugs found in the paper box (P5A) and gave his versions. The High Court judge has considered the defence versions as appears in his comprehensive grounds of judgment. Next, is whether the decision is correctly made and if not that would allow us to step in and correct the decision.

[50] We analyse the following issues submitted by Dato' Gheetan Ram as follows.

Access to the house and the table in the living room

[51] SP2 and SP3 gave evidence that the box (P5A) containing the dangerous drugs and paraphernalia related to the said drugs was found on the table in the guest area of the appellant's apartment which was near the appellant and can be easily seen by the appellant. The appellant was the only person inside the apartment. We agree with the High Court judge that it is unreasonable for the appellant not to have knowledge of or had noticed the said box (P5A). The appellant has dominant possession of the said apartment and

things inside the apartment. As an occupier of the said apartment, the appellant has care and management of the said apartment. The appellant was situated near the table and has the power to deal with it as owner to the exclusion of all other persons (see *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237; [1956] 1 LNS 17). In other words, at the material time during the raid, the appellant had exclusive access to the apartment and things inside the apartment.

Break in the chain of exhibits and/or gap on the issue of identity

[52] It is the finding of the High Court judge that the exhibits seized from the appellant at the place of arrest, and analysis done by SP4 and thereafter brought to court for identification by witnesses are the same. In other words, the High Court judge was satisfied that there is no tampering or interference with the exhibits. We cannot interfere with such observations and findings. As long as there is no break in the chain of evidence regarding the handling of the seized items or drug exhibits, then the issue of the identity of the drugs would not arise (see *Ediawe Eshilama Clinton v Pendakwa Raya* [2015] MLJU 362; [2015] 9 CLJ 169).

Material contradiction by prosecution witnesses

[53] With regard to the alleged contradictions in SP2's and SP3's evidence in the examination of the appellant's car and the arrest on Chua Bee Leong after the appellant was arrested, the High Court judge has made a finding that SP2 and SP3 are credible witnesses. The contradictions of evidence alleged by the appellant are not a material contradictions. The High Court judge was satisfied that the contradiction if any is due to the difference in their memory related to the events ie examination of the car on 1 August 2018 and the arrest of Chua Bee Leong on 2 August 2018. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other (see *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15).

[54] The undisputed fact is that both SP2 and SP3 were present during the arrest of the appellant, seizure of the exhibits, examination of the appellant's car, and the arrest of Chua Bee Leong. The High Court found SP2 and SP3 are truthful witnesses. They do not know the appellant and also did not have any personal interest in this case. Therefore, there is no reason for them to give false evidence to fix the appellant. Be that as it may, it is for the court to decide whether to accept the evidence if there exists a contradiction (see *Public Prosecutor v Mohamed Ali* [1962] 1 MLJ 257). It is only when a witness's evidence on material and obvious matters in the case is so irreconcilable, ambivalent or negational that his whole evidence is to be disregarded (see *Pie*

A *Bin Chin v Public Prosecutor* [1985] 1 MLJ 234).

Failure to investigate by the investigating officer (SP6)

[55] With regards to the issue that SP6 failed to carry out an investigation on
B the guest registered book and CCTV, the High Court judge was satisfied that SP6 had conducted a sufficient investigation in showing that the drugs found in the box 'Aroma Diffuser' and paraphernalia related to the drugs were found on the table at the guess area of the appellant's apartment which is under the care, custody, and knowledge of the appellant and the appellant was the only
C person in the apartment during the raid on 1 August 2018. In our view, this is the core evidence for the prosecution. The High Court judge accepted the explanation given by SP6 with regards to the guest registered book and CCTV complained of by the appellant. The High Court judge was satisfied that the investigation was complete to prove the appellant is the only person involved in
D the trafficking of the dangerous drugs.

Admissibility of the statutory declaration (IDD36)

[56] The statutory declaration (IDD36) which was given to SD3 and SD6,
E revealed that the drugs belong to Chris. It is the appellant's submission that IDD36 should be accepted to show that the appellant was not involved with the drugs. Based on the evidence, the High Court judge found Chua Bee Leong is a real person but he was not involved with the drugs. Chua Bee Leong never comes to court to give evidence as defence witness although he is the maker of
F IDD36. He gave different reasons for not coming to court to SD3 and SD6. IDD36 was given to SD3 and SD6, however, they are not the maker of IDD36. The High Court judge also found, the evidence on Chris is highly suspicious. Chris never exists and is a suspicious character. The statutory declaration (IDD36) is therefore inadmissible as the maker did not appear in court. In the
G circumstances, no weight is to be given. The statutory declaration was also made more than one year ie dated 17 September 2019 after the arrest of the appellant. Chua Bee Leong was also not jointly arrested with the appellant.

Conduct of the appellant

H

[57] It was argued that there is no resistance shown by the appellant during the raid and this conduct is consistent with the conduct of a person having no knowledge of the said drugs. We agree with the appellant that the learned judge did not deal with this issue in his judgment. However, in our view, the omission
I does not have any effect on the judgment. Be that as it may, SP2 saw the appellant was looking stunned when the search was made on him. This evidence of conduct can be admitted under ss 8 and 9 of the Evidence Act 1950. Augustine Paul FCJ in *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717 held at para [38] that the reaction of the appellant

in looking stunned or shocked upon being approached by the police is clearly admissible under s 8 since it has a direct bearing on the fact in issue as the drugs found.

DNA or fingerprints

[58] We were also of the view that without DNA or fingerprints to connect the appellant with the drugs contained in the said box (P5A) as contended by counsel, it does not affect the prosecution's case because the evidence is very clear that the appellant had custody and control of the box (P5A) which was placed on the table at the guess area. Therefore, in this case, DNA or fingerprints evidence assumes little value or significance (see *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560; [1997] 1 CLJ 233).

Wrongly attached a higher burden of proof

[59] We find the High Court judge is clear and specific in invoking the presumption of possession under s 37(d) of the Dangerous Drugs Act 1952 when called for defence at the end of the prosecution case. The High Court judge made a finding that the appellant's defence is a bare denial and an afterthought. The defence story failed to raise any reasonable doubt on the prosecution's case or to rebut the presumption of possession and knowledge on the balance of probability under s 37(d) of the DDA 1952. The appellant's defence as a whole failed to raise any reasonable doubt according to the learned judge. Hence, satisfied that the prosecution has proved its case beyond reasonable doubt against the appellant on the charge under s 39B(1)(a) of the DDA 1952 and sentence under s 39B(2) of the Act. The appellant was found guilty and sentenced to death.

[60] We find there is no error in the High Court judge's decision. The decision may have mentioned the words, 'any reasonable doubt on the prosecution's case or to rebut the presumption of possession and knowledge on the balance of probability' under s 37(d) of the DDA 1952, at the end of the trial, the court found the prosecution has proved its case beyond a reasonable doubt after considering all the evidence adduced in complying with s 182A of the Criminal Procedure Code. Section 182A(1) provides that at the conclusion of the trial, the court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.

Possession

[61] Having read the grounds of judgment, particularly at paras 13–14 of the judgment, it cannot be disputed that the High Court judge has made a specific finding that the appellant had custody and control of the drugs found inside the box (P5A) and the paraphernalia related to the drugs on the table in

A the guest area of his apartment. The finding at paras 13–14 say as follows:

> [13] Mahkamah ini juga mendapati tertuduh mempunyai jagaan dan kawalan ke atas kotak (P5A) dan dadah yang disembunyikan dalam kotak tersebut. Selain itu, paraphernalia berkaitan dadah yang dijumpai di atas meja di ruang tamu rumah tertuduh juga di bawah jagaan dan kawalan tertuduh. Justeru, tertuduh boleh
B dianggap mempunyai milikan (*presumed possession*) dan juga pengetahuan (*presumed knowledge*) mengenai dadah dan jenis dadah berbahaya dalam kotak (P5A) tersebut berdasarkan anggapan di bawah s 37(d) ADB 1952, sehingga dibuktikan sebaliknya.
>
> [14] Bagi pertuduhan yang dihadapkan ke atas tertuduh, mahkamah ini berpuas
C hati dan mendapati fakta dan keadaan dalam kes in membolehkan anggapan pemilikan dan pengetahuan di bawah s 37(d).

[62] The finding of presumed possession and knowledge of the said drugs
D under s 37(d) were based on the evidence of SP2 and SP3 who found the box (P5A) on the table in the guest area which contained the dangerous drugs. The finding is at para 15 of the said grounds of judgment as follows:

> [15] Mengenai pemakaian anggapan tersebut, keterangan SP2 dan SP3 menunjukkan dadah berbahaya tersebut telah dijumpai di dalam kotak 'Aroma
E Diffuser' yang berada di atas meja di ruang tamu rumah tertuduh. Semasa kejadian, dadah berbahaya tersebut berada dalam jagaan, kawalan dan pengetahuan tertuduh. Meja tersebut pula berada di ruang tamu rumah tertuduh dan dapat dilihat dengan mudah oleh tertuduh. Adalah tidak munasabah tertuduh tidak melihat kotak (P5A) yang mengandungi dadah tersebut dan paraphernalia
F berkaitan dadah yang berada di atas meja tersebut.

[63] The finding is supported by other evidence that the apartment was rented by the appellant from SP5. The tenancy agreement dated 18 December 2017 with SP5 (P29) and the keys which were handed over to the appellant
G (P24) had been identified. The keys (P24) were seized from the appellant during the raid. The appellant was the only person in the apartment when the box (P5A) was found. With this evidence, the High Court judge concluded that as the tenant of the said apartment, the appellant has access and care and management of the said apartment. The finding can be found at paras 16–21
H of the grounds of judgment.

[64] On the issue of posession, Thompson J made an observation in *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237; [1956] 1 LNS 17 as follows:

> Possession itself as regards the criminal law is described as follows in *Stephen's Digest*
I (9th Ed) p 304:
>
> > A movable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

> ... But there must be something in the evidence to satisfy the court that the person who is phsically in a position to deal with the thing as his own had the intention of doing.

[65] It was also held in *Public Prosecutor v Denish a/l Madhavan* [2009] 2 MLJ 194 that once the elements needed to constitute possession are established, including the elements of exclusive power to deal, then what is established is possession, not exclusive possession. So much for exclusive possession.

[66] Custody means having care or guardianship, goods in custody are in the care of the custodian and, by necessary implication, he is taking care of them on behalf of someone else, you cannot take care of goods unless you know where they are and have the means of exercising control over them (see *Leow Nghee Lim v Reg* [1956] 1 MLJ 28).

[67] The High Court judge has made a specific finding based on the evidence presented by the prosecution during the trial. In other words, the decision is based on the finding of fact of which the High Court judge was satisfied that the appellant has custody, control and knowledge of the dangerous drugs hidden inside the box (P5A). The appellant is deemed to have possession under s 37(d) of the Act.

[68] On the law, there are two things 'deemed' by s 37(d), namely (1) that the accused was in possession of the drug and the accused knew the nature of the drug. The apex court had decided that once custody or control is established, the presumption must be invoked. The 'deemed' state of affairs (ie deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs is arrived at. There need only to be established the basic or primary facts necessary to give rise to that state of affairs ie the finding of custody or control. Such presumptions as under s 37(d) (and for that matter, the one under s 37(da) sometimes described as 'compelling presumptions' in that upon proof of certain facts by a party (in our present case, proof of custody or control in s 37(d) by the prosecution), the court must in law draw a presumption in its favour (ie presumptions of possession and knowledge) unless the other party proves the contrary. Such a presumption has the compelling force of law. It is a deduction which the law requires the trial court to make (see *Ogbugo Chioma Martha v Public Prosecutor* [2019] MLJU 295; [2019] 1 LNS 491 following *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 2 CLJ 170).

Knowledge

[69] The appellant had contended that he has no knowledge about the drugs found in the box (P5A) because P5A did not belong to him but belonged to Chris. In our view, proof of knowedge here is not by direct evidence but circumstantial evidence relied upon by the prosecution. Augustine Paul FCJ in *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717 held that in most cases, knowledge cannot be adduced by direct or tangible evidence but only by inference from surrounding circumstances. Similarly, in *Chan Pean Leon v Public Prosecutor*, it was said that intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case. The court further held that knowledge cannot be proved by direct evidence, it can only be proved by inference from the surrounding circumstances. Again the possible variety of circumstances which will support such an inference is infinite. There may be something in the accused's behaviour that shows knowledge, or the nature of the thing may be so obvious that it is possible to say 'he must have known what it was' or, again in cases under the Dangerous Drugs Ordinance, there may be statutory presumption which fills a gap in the evidence (see also *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489; [2004] 4 CLJ 551).

[70] In *Teh Hock Leong v Public Prosecutor* [2008] MLJU 284 the Court of Appeal also held that mens rea possession is an element of the offence of trafficking. But it is an element like the mental element in other crimes which cannot be established by direct evidence save in a case where an accused expressly admits the commission of the offence. It has, like the mens rea in other offences, to be established by circumstantial evidence. In other words, it is an ingredient that is to be inferred from the totality of the circumstances of a particular individual case.

[71] As held in the above cases, knowledge can only be inferred from surrounding circumstances. In the present case, the table where the box (P5A) containing drugs was found located in the guest area of the apartment which can be easily seen by the appellant. The High Court judge made an inference from this fact that it is unreasonable for the appellant not to have knowledge or had noticed the said box (P5A) on the table. The High Court judge has considered this at para 15 of the judgment. In our view, his decision is correct and we have no reason to interfere.

Trafficking (s 2 of the DDA 1952)

[72] Having found the appellant has possession of the dangerous drugs, the subsequent finding is whether the drugs found is for purpose of trafficking. The learned judge invoked s 2 of the Act whether the manner the drugs were found

fulfills the element of trafficking under s 2 of the Act. It is not disputed that the drugs were found kept in the paper box (P5A) on the table in the guest area. The definition 'keeping' triggers the invocation of s 2 of the Act (see *Teh Geok Hock v Public Prosecutor* [1989] 3 MLJ 162; *Munuswamy Sundar Raj v Public Prosecutor* [2015] 6 MLJ 214; and *Mohamad Yazri bin Minhat v Public Prosecutor* [2003] 2 MLJ 241; [2003] 2 CLJ 65). The conduct of keeping the drugs in P5A, in our view, proved that the appellant has the intention to traffic the said drugs. In this regard, we find there is no appealable error committed by the learned judge.

Additional issues

[73] The issues were raised and submitted by Dato' Hisyam Teh Poh Teik. The focus is to highlight the involvement of Chua Bee Leong who was arrested by the police and investigated. It was submitted that the witnesses who had been investigated by the police and from whom the statements have been recorded must be offered to the defence (see *Rosli bin Yusof v Public Prosecutor* [2021] 4 MLJ 479; [2021] 7 CLJ 681). The failure of the prosecution to call or offer Chuah Bee Leong to the defence had prejudiced the appellant and s 114(g) of the Evidence Act ought to have been invoked against the prosecution.

[74] We find the issue raised has no merit. The High Court did not make any error in its decision. The High Court judge has made a finding that Chua Bee Leong was not jointly arrested with the appellant. The evidence shows that Chua Bee Leong was arrested after the appellant's arrest and the police investigation shows that the arrest of Chua Bee Leong has nothing to do with the finding of the drugs hidden in the box 'Aroma Diffuser' (P5A) on the table at the guest area of the appellant's apartment. The arrest on Chua Bee Leong is also not related to paraphernalia found on the same table at the same place. Therefore, the issue of failure of the prosecution to call or offer Chuah Bee Leong to the defence does not arise. The contention by Dato' Hisyam Teh Poh Teik that the non-calling of Chua Bee Leong by the prosecution had prejudiced the appellant and s 114(g) of the Evidence Act 1950 ought to have been invoked against the prosecution is misconceived and without merit.

[75] It is essential to appreciate the scope of s 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case (see *Pendakwa Raya lwn Mohd Isha bin Alias dan satu lagi* [2003] 3 MLJ 305; [2003] 2 CLJ 142). It was held in *(1) Namasiyiam (2) Rajindran (3)*

Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor [1987] 2 MLJ 336 that an adverse cannot be drawn for failure to call a witness when the prosecution has discharged its burden.

[76] The evidence shows that the appellant was the only person in the apartment when he was arrested by SP2 and SP3 on 1 August 2018. Neither the appellant had informed SP2 and SP3 relating to Chua Bee Leong's involvement in the trafficking in the dangerous drugs during his arrest on 1 August 2018. The appellant also did not inform SP6 relating to Chua Bee Leong's involvement during investigation and recording of his statement on 3 August 2018. Further, there is no police report made by SD3 relating to the information given to him by Chua Bee Leong. Chua Bee Leong never come to come to court to be defence witness.

CONCLUSION

[77] Based on the evidence, we find the High Court judge is clear and specific in invoking the presumption of possession under s 37(d) of the Dangerous Drugs Act 1952 when called for the defence at the end of the prosecution case and at the conclusion of trial after considering all the evidence adduced before him, he has made decision that the appellant is guilty on the charge against him and convicted the appellant and sentence him to death. There is no appealable error in the decision of the High Court judge.

[78] It is our unanimous decision that the conviction is safe and we affirmed the conviction and sentence of the High Court judge.

Appeal dismissed and conviction and sentence affirmed.

Reported by Ashok Kumar